UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

ST. LUKE'S HOSPITAL Employer and UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC Petitioner	Case 18-RC-16543

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was scheduled before a hearing officer of the National Labor Relations Board. Prior to the date of the scheduled hearing, all parties, including the MLPNA, entered into a Stipulation of Fact. In the Stipulation, the parties agreed that I could make a decision based upon the facts contained in the Stipulation; that the complete record consists of the stipulated facts and exhibits attached to the Stipulation; and that they waived their rights to a pre-election hearing.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.

Upon the entire record in this proceeding, I find:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[1]

2. The labor organizations involved claim to represent certain employees of the Employer.[2]

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The Petitioner seeks to represent a residual technical unit consisting of all unrepresented technical employees employed by the Employer at its Duluth, Minnesota facility (hereafter referred to as "the hospital"), an acute-care hospital within the meaning of the Board's Rules on Collective Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16336, 29 C.F.R. Sec. 103.30, 284 NLRB 1580 (effective May 22, 1989). The job classifications that would be encompassed within the petitioned-for residual technical unit, should such a unit be found appropriate, have been identified and agreed upon by the parties.

The Employer, contrary to the Petitioner, contends that the petitioned-for residual technical unit is inappropriate, is contrary to the Board's Health Care Rule and precedent, and would result in undue proliferation of bargaining units. The Employer asserts that the only appropriate unit is a unit of *all* technical employees employed by the

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[1] The Employer, St. Luke's Hospital, a Minnesota corporation, operates an acute-care hospital located at 915 East First Street, Duluth, Minnesota. In the past 12 months, the Employer derived gross revenues in excess of $500,000, and purchased and received goods and services valued in excess of $50,000 directly from suppliers located outside the State of Minnesota.

[2] The Motion to Intervene of Minnesota Licensed Practical Nurses Association is hereby granted.

Employer at its hospital, including about 75 licensed practical nurses (LPNs) currently represented by the Minnesota Licensed Practical Nurses Association (MLPNA).

There are currently five incumbent unions representing a total of about 665 hospital employees in five existing bargaining units:

(1) A unit of about 75 LPNs represented by the MLPNA for many years. The most recent collective-bargaining agreement between the Employer and MLPNA was effective from October 1, 1996 to September 30, 1999.

(2) A unit of about 160 employees represented by UFCW Local 1116. The unit consists of, among others, housekeeping employees, dietary employees, and attendants;

(3) A unit of about 10 engineers (skilled maintenance employees) represented by IUOE Local 70;

(4) A unit of about 45 homemakers and home health technicians represented by AFSCME Local 3558; and

(5) A unit of about 375 registered nurses (RNs) represented by the Minnesota Nurses Association (MNA).

These five units—all of which apparently were in existence before the promulgation of the 1989 "Collective-Bargaining in the Health Care Industry; Final Rule" (hereafter called "Health Care Rule")—are "non-conforming" units under the Board's rules for acute-care facilities, in that there are unrepresented technicals omitted from the existing MLPNA unit; unrepresented nonprofessionals omitted from the existing nonprofessional units; and unrepresented skilled maintenance employees omitted from the existing IUOE skilled maintenance unit. See "Collective Bargaining Units in the Health Care Industry; Final Rule," supra, at 284 NLRB 1597.

Since at least 1982, the Employer and the MLPNA have enjoyed a period of collective bargaining in the unit of LPNs, having negotiated successive contracts to

September 30, 1999. Negotiations are currently scheduled for November 1999 for a contract to succeed the one that expired on September 30, 1999. Prior to the filing of this petition, no labor organization expressed interest in representing the unrepresented technical employees as a residual unit, and the MLPNA specifically disclaimed any interest in representing the residual unit of technicals. All LPNs employed by the Employer are included in the MLPNA unit, and Petitioner is not interested at this time in representing a unit of technical employees that includes LPNs. However, Petitioner did attempt to organize the LPNs during the instant organizing campaign, as part of an overall technical unit.

The inquiry into the petition's appropriateness exists, therefore, because of the fact that the Employer is an acute-care hospital under the Board's Health Care Rule, because Board rules set forth eight appropriate units for collective bargaining in acute-care hospitals, and because the Board's eight appropriate units do not include separate units of LPNs and technical employees.

However, the question concerning representation raised by this petition cannot be resolved through a simple application of the eight unit descriptions set forth in the rule, because the existing LPN unit is an "existing non-conforming" unit within the meaning of the Board's Health Care Rule. More specifically, the rule states:

> (a) . . . Except in extraordinary circumstances *and in circumstances in which there are existing non-conforming units,* the following shall be appropriate units, and the only appropriate units for petitions. . .
>
> (1) All registered nurses.
>
> (2) All physicians.
>
> (3) All professionals except for registered nurses and physicians.

(4) All technical employees.

(5) All skilled maintenance employees.

(6) all business office clerical employees.

(7) All guards.

(8) All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards. . . .

(c) Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed . . . the Board shall find appropriate only units which comport, *insofar as practicable*, with the appropriate unit set forth in paragraph (a) of this section.

54 Fed. Reg. at 16347, 29 C.F.R. at Sec. 103.30(a) (emphases added).

The Employer argues that the petitioned-for unit is inappropriate and that the only appropriate unit is an all-technical unit, including the currently represented LPNs. The Employer, in advancing its position, relies on the 1989 Health Care Rule, St. John's Hospital, 307 NLRB 767 (1992); and Levine Hospital of Hayward, 219 NLRB 327 (1975). In Levine, a case predating the 1989 Health Care Rule by more than 12 years, an employer operating an acute-care hospital had collective-bargaining relationships with two different unions representing almost all of its 150 employees. The petitioner was a third, non-incumbent union seeking to represent a separate unit of seven medical records clerks and transcribers. The petitioner argued that the sought-after unit was an appropriate residual unit of unrepresented nonprofessional employees. The Board, which expressed concern about undue proliferation of units at the health care facility and specifically noted the small size of the unit being sought, held that the unit was

inappropriate because the medical records clerks and transcribers properly belonged in one of the existing units with whom they shared a very strong community of interest.

In Levine, the group being sought consisted of seven employees working in two classifications and the existing nonprofessional unit was a broad one. In contrast to Levine—which the Board later acknowledged involved "a very unusual set of circumstances"[3]—the residual technicals being sought herein consist of employees working in about 20 different classifications, and the existing unit consists of a small number of employees (about 75) working in only one classification (LPN).

Similarly, in St. John's Hospital, 307 NLRB 767 (1992), a case which is after the 1989 Health Care Rules, the Board dismissed a petition where the petitioning union sought to represent all remaining unrepresented skilled maintenance employees, but in a unit separate from an existing unit of plumber foremen and refrigeration employees, which unit the petitioning union already represented. The Board found that where an incumbent seeks to add residual employees, it must seek to add them to the existing unit in order to avoid undue proliferation of units. In contrast to St. John's, of course, in the instant matter the petitioner is not an incumbent union.

The distinction between an incumbent and a non-incumbent union is a critical one. If the petitioning union is an incumbent union, it is arguably more "practicable" to require the incumbent union to add unrepresented classifications to a unit it already represents at the same facility. But requiring a non-incumbent union to petition for all technicals, rather than all residual technicals, is to require that non-incumbent union to raid an existing unit and to disrupt a long-standing bargaining relationship. While the

[3] St. Francis Hospital, 265 NLRB 1025 n. 67 (1982), vacated on other grounds, 271 NLRB 948 (1984).

avoidance of proliferation of units in the health care industry is an important concern in health care cases, it is not the only component to be considered in resolving health care unit issues. See, e.g., Bay Medical Center, Inc., 588 F.2d 1174 (6th Cir. 1978), enforcing 218 NLRB 620 (1975) (policy against undue proliferation must be reconciled with policy against disruption of existing bargaining relationships).

The Employer asserts that Levine, St. John's, and the Board's Health Care Rule clearly compel a dismissal of this petition. But, as the Board itself acknowledged during its deliberations over the Health Care Rule, it is not clear at all. In fact, the Board expressly acknowledged that in a Levine-type fact pattern—where non-conforming units exist and a non-incumbent union seeks a residual unit—the requirement of an all-inclusive unit may *not* be "practicable" and the outcome should be adjudicated on a case-by-case basis:

> (2) Where existing units are not in conformity with the new proposed final rule, we can anticipate a number of questions arising with respect to the applicability of the new rules. Where units smaller than those permitted by the rules already exist, may the incumbent petition for a residual unit[?] May another labor organization[?] What will be the continued viability of the principles enunciated in *Levine*[?] (citation omitted). . . . These issues have not been extensively addressed during the rulemaking proceeding, and it is the Board's judgment that their resolution should, for the time being, be deferred pending the adjudication of particular cases that present these issues. The Board will, in the adjudication of cases, attempt to apply the new rules to these situations insofar as practicable.

"Notice of Proposed Rulemaking II, XV. Partially Organized Facilities," 53 Fed. Reg. 33930.

In any event, the continued viability of the principles enunciated in Levine, insofar as they apply to situations as in the instant case where a non-incumbent union seeks a residual unit, is unclear. In Crittenton Hospital, 328 NLRB No. 120 (1999), the Board overruled Levine to the extent that it suggested that a non-incumbent union could not seek to represent an existing non-conforming unit of RNs. The Board permitted, therefore, the petitioning union to seek to represent the employees in the existing non-conforming unit. More importantly, the Board stated: "We leave to another day the question whether a nonincumbent union may represent a residual unit of employees in the health care industry." Id. at fn. 9. Thus, contrary to the Employer, I conclude that neither St. John's nor Levine compels a conclusion that the residual unit of technical employees is inappropriate.

Finally, the Employer argues, in contrast to St. Mary's Duluth Clinic Health System and United Steelworkers of America, AFL-CIO, CLC, Case 18-RC-16399, a decision I issued on February 19, 1999, which is currently before the Board following St. Mary's Request for Review, that there are critical factual differences between the instant case and St. Mary's. The Employer points out that in the instant case there is no contract between the Employer and MLPNA that would bar the processing of a petition for an overall technical unit, and that Petitioner, at least at one time, attempted to include the LPNs in the organizing effort. Therefore, the Employer maintains that there would be no disruption of the bargaining relationship between the Employer and MLPNA, because the Petitioner has already attempted to "raid" the represented LPNs, and because no current contract bars processing the petition in an overall technical unit (including LPNs). While both facts—that no current contract is in place between the

Employer and MLPNA and that Petitioner initially attempted to include LPNs in its organizing effort—are stipulated to by the parties, I find neither warrants a conclusion that the petition should be dismissed. Rather, it is the long and harmonious relationship for the existing LPN unit that would be unduly disrupted by compelling a non-incumbent union to seek to include LPNs or by forcing the MLPNA to seek to expand its existing unit by the addition of 20 job classifications. (The fact that Petitioner was unable to generate support in the existing LPN unit only serves to put an empirical and practical face on what is normally a theoretical claim of disruption.) It is that relationship, regardless of the existence of a contract, that should not be disrupted. As the Board stated in Crittenton Hospital, supra, slip op. at p. 2:

> In promulgating the Health Care Rule, the Board took into consideration not only the Congressional admonition against undue proliferation of bargaining units, but also the Board's longstanding policy of promoting industrial stability by according great deference to collective-bargaining history.

On balance, I conclude that it would be unduly disruptive to the Employer's collective-bargaining relationship with the MLPNA to compel a non-incumbent union to seek to include the LPNs in a technical unit. In reaching my conclusion, I rely particularly on the Board's long-standing policy of promoting stability by according great deference to collective-bargaining history; on the facts that the Petitioner is not an incumbent union and seeks to represent a residual unit of not just some—but all—unrepresented employees; and on the disclaimer by the MLPNA in representing the unrepresented technicals.[4]

[4] In its post-hearing brief, the Employer notes that the MLPNA's disclaimer relates to the present time, and the MLPNA does not rule out interest in representing technical employees other than LPNs in the future. While the Employer's claim is undoubtedly true, the fact that a union does not waive a

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time technical employees, including cardiac catheterization technologists, cardio diagnostic technologists, CT technologists, echo cardiograph technologists, exercise physiologists, lab technicians, lead diagnostic technologists, mammography technologists, neuro diagnostic technologists, nuclear medicine technologists, OT assistants (certified), pathology assistants, physical therapy assistants, quality control mammography technologists, radiology technologists, respiratory practitioners (certified or registered), special procedures technologists, surgery technicians, and ultrasound technologists employed by the Employer in its Hospital located at 915 E. First Street, Duluth, Minnesota; excluding all on-call, casual, and student employees, professional employees, nonprofessional employees, skilled maintenance employees, business office clerical employees, registered nurses, physicians, medical technologists, cytologists, laboratory technical specialists, histology lab technicians, biomedical specialists and technicians, lead lab technologists, certified pathology assistants, clinic employees, and guards and supervisors as defined in the Act.

DIRECTION OF ELECTION[5]

An election by secret ballot will be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible

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possible future interest in representation is not necessary for the disclaimer to be effective. Cf. Gazette Printing Co., 175 NLRB 1103 (1969). This same analysis would apply to the Employer's speculation in its brief that perhaps at some time in the future Petitioner would seek to represent the LPNs.

[5] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **November 12, 1999**.

are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[6]

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by United Steelworkers of America, AFL-CIO, CLC.

Signed at Minneapolis, Minnesota, this 28th day of October, 1999.

/s/ Ronald M. Sharp

Ronald M. Sharp, Regional Director
Eighteenth Region
National Labor Relations Board

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[6] To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. In order to be timely filed, this list must be received in the Minneapolis Regional Office, Suite 790, Towle Building, 330 Second Avenue South, Minneapolis, MN 55401-2221, on or before **November 4, 1999**. No extension of time to file this list may be granted by the Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.